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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

DEBORAH HUARD,

Petitioner,

vs.

ERNEST P. O'CONNOR, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States District Court for the District of Maine erred in submitting a claim to the jury that was not contained in the Respondent's Amended Complaint and was not the subject of a motion for leave to amend?

II. Whether the deliberate indifference standard applies to a pretrial detainee's due process claim brought under the Fourteenth Amendment to the United States Constitution based on episodic acts by a corrections officer?

III. Whether a corrections officer denies a pretrial detainee due process rights guaranteed by the Fourteenth Amendment to the United States Constitution when the officer allegedly taunts the detainee to provoke a response that would justify administrative lockdown?

IV. Whether the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit erred or committed "plain error" in failing to grant judgment for the Petitioner on the basis of qualified immunity?

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

Deborah Huard

Defendant/Petitioner

Ernest P. O'Connor, Jr.

Plaintiff/Respondent

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The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on June 27, 1997, and the order of the First Circuit on the petition for rehearing and rehearing *en banc* entered on July 23, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 117 F.3d 12 (1st Cir. 1997). A copy is reproduced as Appendix A. The order of the First Circuit denying the petition for rehearing and rehearing *en banc* is unreported. A copy is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 27, 1997. On July 23, 1997, the First Circuit entered an order denying the Petitioner's petition for rehearing and rehearing *en banc*.

The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions implicated by this lawsuit are the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Fourteenth Amendment (Section 1 only)

> All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case

By a *pro se* Complaint dated March 15, 1994, Respondent Ernest P. O'Connor, Jr., commenced this action in the United States District Court for the District of Maine pursuant to 42

U.S.C. § 1983. He sought compensatory and punitive damages and declaratory relief against Alfred Cichon, Catherine Mesaric and Petitioner Deborah Huard. Cichon was a Physician's Assistant who provided the Respondent with medical care at the Kennebec County Correctional Facility ("the Jail"). Mesaric and Huard were Corrections Sergeants employed at the Jail.

After the Respondent obtained counsel, he filed a First Amended Complaint dated August 24, 1995. At all times pertinent to the Complaint and Amended Complaint, the Respondent was a pretrial detainee at the Jail. The Amended Complaint alleged that the defendants acted with "deliberate indifference" to his "serious medical needs." The Amended Complaint also alleged that the defendants' deliberate actions or omissions subjected the Respondent to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Amended Complaint ¶ 1.

The Amended Complaint alleged that the Petitioner failed to provide the Respondent with medication for a diagnosed medical disorder. Amended Complaint ¶ 13. It further alleged that the Petitioner "*used [her] knowledge* of the fact that Plaintiff had *not received his necessary medication* to harass the Plaintiff . . . *knowing* he was unlikely to be able to resist reacting with extreme anger in an inappropriate fashion." Amended Complaint ¶ 15 (emphasis added). It also alleged that the Petitioner "used the improper reactions" she solicited from him as the basis for "reports which resulted in periods of 'lock down.' " Amended Complaint ¶ 16.

By an Answer dated August 31, 1995, Mesaric and the Petitioner denied the material allegations in the Amended Complaint and asserted a variety of affirmative defenses, including failure to state a claim upon which relief may be

granted, qualified immunity under 42 U.S.C. § 1983, and the Respondent's own conduct as the legal cause of his injuries.

B. Course of Proceedings Below

In his trial brief, the Respondent argued that he intended to prove that the Petitioner[1] violated his constitutional rights by provoking him into "rage attacks." The Respondent expressed his theory as follows:

> Huard knew that without his customary medication, O'Connor would become unruly when provoked. Yet she used that knowledge to provoke him with taunts and harassment, precisely for the purpose of precipitating O'Connor's "rage attacks."

Plaintiff's Trial Brief at 5.

The case was tried to a jury on June 3 and 4, 1996. At the close of the Respondent's case-in-chief, the Petitioner moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. Tr. at 255-59. She argued that the Respondent failed to show, as a matter of substantive law, "deliberate indifference" to the Petitioner's serious medical needs pursuant to *Farmer v. Brennan*, 511 U.S. 825 (1994). Tr. at 255. The District Court[2] took that motion "under advisement." Tr. at 258-59.

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1. The Respondent's claims against Cichon and Mesaric were resolved prior to trial. The District Court granted Cichon summary judgment by an order dated January 20, 1996. The Respondent dismissed his claim against Mesaric voluntarily on the eve of trial.

2. Pursuant to 28 U.S.C. § 636(c)(1), the parties consented to allow the Magistrate Judge to preside at trial and enter judgment on behalf of the District Court.

At the close of all the evidence, the Petitioner again moved for judgment as a matter of law under Rule 50. Tr. at 386-89. The District Court denied that motion, reasoning that the issue was "simply whether or not the defendant [sic] . . . was punished in violation of his constitutional rights." Tr. at 390-91.

After the Magistrate Judge instructed the jury, the Petitioner objected to the instructions and the verdict form. Tr. at 397-98, 440-41, 447-49. Specifically, the Petitioner requested jury instructions consistent with *Farmer*. In addition, she requested a jury verdict form setting forth specific questions that would have enabled the District Court to conduct a qualified immunity analysis. Tr. at 448-49. The Magistrate Judge denied these requests, stating: "I'm satisfied, in this particular instance, as the evidence has been developed, that no qualified immunity issue has been generated." Tr. at 449-50.

On June 4, 1996, the jury concluded that the Petitioner violated the Respondent's Fourteenth Amendment rights, and it awarded him $1.00 in damages. Tr. at 451-52. The District Court proceeded to instruct the jury on punitive damages, which the jury declined to award. Tr. at 459-461, 466-67.

By a motion dated June 18, 1996, the Petitioner renewed her Rule 50 motion for judgment as a matter of law. She also moved, in the alternative, for a new trial. She argued that she did not violate the Respondent's clearly established rights and that her conduct was objectively reasonable. The District Court denied that motion by an order dated July 15, 1996, concluding: "as a matter of law that Defendant would not be entitled to qualified immunity." Order at 1-2.[3]

The Petitioner appealed the District Court's judgment on

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3. A copy of the District Court's July 15, 1996 order is reproduced as Appendix B.

the jury verdict and subsequent denial of her post-trial motions to the United States Court of Appeals for the First Circuit (the "First Circuit") by a notice dated July 18, 1996. The Respondent filed a notice of cross appeal dated July 19, 1996.

The First Circuit affirmed the District Court's judgment and orders by a decision dated June 27, 1997. The Petitioner petitioned for a rehearing of that decision and for rehearing *en banc*. The First Circuit denied those requests by an order dated July 23, 1997.[4]

C. Statement of Facts with Record Citations.

1. The Respondent's "Second" Incarceration in October 1993.

The Respondent was initially incarcerated at the Jail for "a couple of weeks" in January of 1993. Tr. at 209-10. The Respondent was again incarcerated at the Jail on October 30, 1993. Tr. at 209-10. The Respondent's "second" incarceration ended on May 18, 1994, when he was transferred out of the Jail after he assaulted four corrections officers, including the Petitioner. Tr. at 343-44, 346.

The Respondent testified that he did not like the Petitioner. Tr. at 211. In part, he formed the opinion that she was a lesbian, something he could reportedly tell by looking at her. Tr. at 232-33. The Respondent believed that lesbians "dislike men," and he felt that lesbians should not be working at a Jail where they had "control over men." Tr. at 212.

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4. The First Circuit did, however, correct an error in its rendition of the facts by a notice dated August 14, 1997. The First Circuit made this correction in response to the Petitioner's motion dated July 30, 1997, in which she demonstrated that a factual assertion made in the First Circuit's initial opinion was not supported by any record evidence.

During this second stay at the Jail, the Respondent obtained medical treatment from both Cichon and Paula Larrabee, a psychiatric nurse consultant at the Jail. Tr. at 83. The Respondent asked Cichon for medication; however, Cichon determined that "it was not appropriate." Tr. at 272, 274. Cichon explained that he denied the Respondent's request for medication because he was unable to verify his history. Tr. at 274. He also concluded that the Respondent did not suffer from "an anxiety disorder." Tr. at 274, 281. Finally, Cichon was concerned about the Respondent's history of drug abuse, particularly drugs belonging to the Benzodiazepine family. Tr. at 274.

The Respondent testified that he was not prescribed any medication at the Jail from October of 1993 forward, even though he wanted it. Tr. at 215. "I never got no [sic] medication at Kennebec County Jail." Tr. at 240.

2. The Inmate Rules and Disciplinary Action.

According to the Petitioner, the Jail had "a lot of problems with [the Respondent]." Tr. at 359. She testified that he did not like to follow the Inmate Rules, did not like to make his bed, and did not like to clean his cell area. Tr. at 359. When corrections officers would ask him to perform these tasks, he would argue with them and complain about what he considered to be "stupid rules" in the Jail. Tr. at 359-60.

All persons incarcerated at the Jail are given an Inmate Rule Handbook when they are in-processed that sets forth Rules and Procedures that they must follow. Tr. at 350. Inmates are subject to discipline for violations of these Inmate Rules. Tr. at 351. Disciplinary action includes a verbal warning, a "write-up," loss of privileges, and administrative lockdown for up to 14 days per disciplinary action. Tr. at 351. All inmates have a right to appeal any disciplinary action taken against them to a

Disciplinary Board, regardless of how serious the underlying violation might be. Tr. at 352.

As a supervisor, the Petitioner had the authority to give inmates verbal warnings, write-ups, and to order inmates into administrative lockdown for a "short amount of time." Tr. at 352. If her supervisor subsequently determined that the inmate was a threat to Jail security, the inmate could be held in administrative lockdown until her supervisor determined an appropriate course of action. Tr. at 353.

3. The Taunting and Harassment.

The Respondent admitted at trial that he verbally abused the Petitioner. Tr. at 216. Specifically, he called her names that referred to his opinion of her sexual orientation. Tr. at 217. According to the Respondent, the Petitioner would, in turn, call him "a scumbag, a low-life, a dirtbag, a drug addict, creep." Tr. at 218.

The Respondent testified that his verbal confrontations with the Petitioner would cause him to "kick the doors, bang the bars." Tr. at 218-19. During these verbal confrontations, the Respondent would "throw water on the door so they couldn't get at me at times." Tr. at 220. When pointedly asked if he was a "problem inmate," the Respondent testified, "I probably was. Yes." Tr. at 236.

The Respondent testified that "it didn't take much to push my buttons." Tr. at 216, 236. He admitted that he was angry during his incarceration and that his anger escalated over time. Tr. at 216. He frankly admitted that he wanted to "hurt" the Petitioner and that doing so "would have been beyond [his] control. I wasn't under control of my actions at that time," allegedly because he was "coming off drugs." Tr. at 221-22, 226, 237.

Three inmates testified at trial concerning the interaction between the Petitioner and the Respondent from October of 1993 to May of 1994. In essence, they stated that the Respondent expressed animosity toward the Petitioner, apparently because he believed she was a lesbian. They also stated that the Respondent would harass the Petitioner and refer to her by derogatory names. They testified that the Petitioner would "tease" the Respondent about not receiving his medication and by saying words to the effect: "we're not going to be your personal drug dealer." Finally, the inmates testified that the Respondent would sometimes become verbally abusive or physical violent after these incidents. Occasionally his reactions would precipitate a lockdown.

4. The Petitioner Denies the Taunting and Harassment.

At trial, the Petitioner denied teasing the Respondent about his medications or doing anything to "push Mr. O'Connor's buttons." Tr. at 361, 363. The Petitioner's job responsibilities did not include dispensing medication to inmates, including the Respondent, and she had no authority that would have enabled her to withhold prescribed medications from him. Tr. at 361. She never reviewed his medical records and had no knowledge of their contents. Tr. at 356. Medical information on all inmates was confidential, and the Petitioner testified that corrections personnel "do not have any access to it whatsoever." Tr. at 356-57.

The Petitioner acknowledged that the Respondent told her that he wanted medication. Tr. at 360. She also acknowledged that he told her that he had "rage attacks," and she mentioned that fact to "somebody in the Medical Department." Tr. at 367.

The Petitioner admitted ordering the Respondent into "lockdown" on occasion, but only when she determined that he

was a threat to the safety or security of the Jail. Tr. at 362-63. When she did order the Respondent into administrative lockdown, she followed the Rules that governed her discretion as a Sergeant Supervisor. Tr. at 363. Her disciplinary actions against the Respondent did not exceed what was authorized by Jail rules. Tr. at 363.

The Respondent testified that the disciplinary action taken against him was "sometimes fair" and "sometimes unfair." Tr. at 224-25, 226-27. Sometimes, he claimed that he was "disciplined" because "somebody else did something wrong." Tr. at 226. When that occurred, he admitted that it sometimes made him "mad." Tr. pp. 226-28.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE ERRED AS A MATTER OF LAW IN SUBMITTING A CLAIM TO THE JURY THAT WAS NOT CONTAINED IN THE RESPONDENT'S AMENDED COMPLAINT AND WAS NOT THE SUBJECT OF A MOTION FOR LEAVE TO AMEND.

According to Federal Rule of Civil Procedure 8(a), a party is required to set forth claims for relief through a "short and plain statement." This Court has observed that a complaint meets the requirements of Rule 8(a) if it provides fair notice of the asserted claims. *See Leatherman v. Tarrant Cty. Narc. Intell. Coord.*, 507 U.S. 163, 168 (1993) (citation omitted).

Notwithstanding the liberality of Rule 8(a), the Circuit Courts of Appeals have held that failure to plead a claim can preclude submission of that claim to a jury. For example, in

Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985), the plaintiff brought a civil rights claim against a municipality and a jail supervisor pursuant to 42 U.S.C. § 1983 based on theories of excessive force, unlawful search and seizure, and impermissible conditions of confinement. The defendants sought to have the District Court instruct the jury that the governmental entity could not be held liable for the failure of its employees to follow established policies. In affirming the District Court's denial of that request, the United States Court of Appeals for the Eleventh Circuit noted that the issues in the case did not justify the proffered instruction: "To have instructed the jury as proposed would have been error since the issue was neither tendered by the pleadings nor raised by the evidence." *Id.* at 1389 (citing *Smith v. Ellerman Lines, Ltd.*, 247 F.2d 761 (3rd Cir. 1957)). *Accord Laird v. Shell Oil Company*, 770 F.2d 508 (5th Cir. 1985); *Blackburn v. Johnson*, 543 N.E. 2d 583, 564 (Ill. App.), *cert. denied*, 548 N.E. 2d 1066 (Ill. 1989) ("Generally, no instruction need be given the jury concerning issues not raised by the pleadings. To instruct a jury on an issue not raised in the pleadings is error.") (citations omitted).

The United States Court of Appeals for the Tenth Circuit has held that the liberalized pleading rules do not require consideration of claims that are not contained in the pleadings if the opposing party is subjected to prejudice. In *Evans v. McDonald's Corporation*, 936 F.2d 1087 (10th Cir. 1991), the Tenth Circuit affirmed the District Court's refusal to consider a Title VII claim asserted after eight months of discovery and just two weeks before trial. While noting that Rule 8(a) required courts to construe pleadings liberally, the Tenth Circuit stated that a late shift in the thrust of a case must not prejudice an opposing party:

> The purpose of "fact pleading," as provided by Fed. R. Civ. P. 8(a)(2), is to give the

> defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery.
>
> We do not believe, however, that the liberalized pleading rules permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case. This practice, if permitted, would waste the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances.

Id. at 1091 (citing 5 Charles Wright & Arthur Miller, *Federal Practice & Procedure* §§ 1215, 1219, at 136-47, 188-94 (West 1990)).

In the instant case, the First Circuit erred in upholding the District Court's conclusion that the Respondent properly raised prior to trial a Fourteenth Amendment due process claim that did not revolve around the issue of medical care. Respondent's Amended Complaint, which was drafted with assistance of counsel, specifically alleges "deliberate indifference" to his "serious medical needs" that amounted to "cruel and unusual punishment" under the Eighth and Fourteenth Amendments of the United States Constitution.

As the Petitioner's requested jury instructions reflect, she relied on these pleadings in formulating her defense of the case through the completion of trial. By construing the Respondent's

claim as a Fourteenth Amendment claim that did not revolve around the issue of medical care, the District Court and the First Circuit effectively denied the Petitioner any fair opportunity to build her defense through discovery and trial. For this reason, the District Court improperly instructed the jury on the issue of due process and the First Circuit erred in failing to rectify this obvious prejudice.

II.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS CREATED A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS BY FAILING TO APPLY THE "DELIBERATE INDIFFERENCE" STANDARD TO CLAIMS BY A PRETRIAL DETAINEE THAT EPISODIC ACTS BY A CORRECTIONS OFFICER DEPRIVED HIM OF A LIBERTY INTEREST WITHOUT DUE PROCESS OF LAW.

As a general proposition, the Fourteenth Amendment prohibits the imposition of "punishment" against a pretrial detainee prior to an adjudication of guilt. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977). *See also Sandin v. Conner*, 515 U.S. 472, 484 (1995). In *Sandin*, the Court, in dicta, observed that the Due Process Clause prohibits a state from attempting to "punish a detainee *for the crime for which he was indicted* via pre-conviction holding conditions." *Id.* at 484 (emphasis added).

The Fourteenth Amendment does not prohibit the imposition of "discipline" upon pretrial detainees as long as that "discipline" does not amount to "punishment" in the constitutional sense. In this regard, the key inquiry is whether any disability imposed upon a pretrial detainee is imposed for purposes of

"punishment," or whether the disability is incident to a legitimate governmental purpose. *Bell*, 441 U.S. at 538. Absent a showing of an expressed intent to "punish" on the part of detention facility officials, this determination turns upon whether an alternative purpose may be assigned to the restriction, and whether the restriction appears excessive in relation to the alternative purpose. *Id.*

If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. *Id.* Legitimate governmental interests include ensuring a detainee's appearance at trial and maintaining the security and order of the detention facility. *Id.* at 540. *See also Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988); *Ellis v. Meade*, 887 F. Supp. 324, 329 (D. Me. 1995).

A. The "deliberate indifference" standard applies to this case because the Respondent's claim was based, at least in part, on failure to provide medical assistance.

In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 n.8 (1989), the Supreme Court "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody." However, seven Circuit Courts of Appeals other than the First Circuit[5] have uniformly held that a pretrial detainee's due process rights to medical care are violated when

5. In fact, by denying the Petitioner judgment as a matter of law, the District Court and First Circuit appear to have diverged from the First Circuit's precedent pertaining to medical care of pretrial detainees. *See Gaudreault v. Municipality of Salem, Massachusetts*, 923 F.2d 203, 208 (1st Cir. 1990) (applying the "deliberate indifference" standard to a pretrial detainee's claim for delay in providing medical attention).

an official acts, or fails to act, with "deliberate indifference." *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996); *Ervin v. Busby*, 992 F.2d 147, 150 (8th Cir.), *cert. denied*, 510 U.S. 879 (1993); *Hill v. Nicodemus*, 979 F.2d 987, 991-92 (4th Cir. 1992); *Boring v. Kozakiewicz*, 833 F.2d 468, 472 (3rd Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Aldridge v. Montgomery*, 753 F.2d 970, 972 (11th Cir. 1985).

The United States Court of Appeals for the Fifth Circuit is the most recent Circuit Court to clarify the "deliberate indifference standard" in the context of a claim asserted by a pretrial detainee. In *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996), the Fifth Circuit held that a state jail official's constitutional liability to a pretrial detainee for denial of medical care is measured by the subjective deliberate indifference standard set forth by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994). *Hare*, 74 F.3d at 643.

In *Farmer*, the Supreme Court held that liability may be imposed upon a prison official for the "deliberately indifferent" denial of "humane conditions of confinement" only if it is shown that "the official knows of and disregards an excessive risk of inmate health or safety." *Farmer*, 511 U.S. at 837-38. "The official must be *both* aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (emphasis added).

Since the Respondent's theory of the case implicated a failure to provide medical assistance, the District Court committed legal error when it refused to apply the deliberate indifference standard in its legal rulings and jury instructions. The First Circuit failed to rectify this error when it affirmed the District Court's denial of judgment as a matter of law and jury

instructions. At the same time, the First Circuit appears to have diverged from its own precedent and decisions of the other Circuit Courts.

B. Episodic acts by a corrections officer involving a pretrial detainee such as taunting should be tested against the "deliberate indifference" standard set forth in *Farmer v. Brennan*.

In *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996), the United States Court of Appeals for the Fifth Circuit made a distinction between general jail conditions, practices, rules, or restrictions of pretrial confinement on one hand, and a jail official's "episodic acts or omissions" on the other, to clarify the governing due process standards. The Fifth Circuit recognized that the general conditions, practices, rules, or restrictions of pretrial confinement manifest an intent on the part of the corrections facility that justifies an analysis under the relatively lenient "rational relationship" test adopted in *Bell v. Wolfish*, 441 U.S. 520 (1979):

> The *Bell* test works comfortably in such cases because the jail official's state of mind is not a disputed issue. In true jail condition cases, an avowed or presumed intent by the State or its jail officials exists in the form of the challenged condition, practice, rule, or restriction. A State's imposition of a rule or restriction during pretrial confinement manifests an avowed intent to subject a pretrial detainee to that rule or restriction. Likewise, even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when

> it incarcerates the detainee in the face of such known conditions and practices. Thus, a true jail condition case starts with the assumption that the State intended to cause the pretrial detainee's alleged constitutional deprivation. Only with such intentionality as a given is the *Bell* test useful.

Hare, 74 F.3d at 644-45 (citation omitted).

The Fifth Circuit determined that the *Bell* test did not have the same efficacy in the context of "episodic acts or omissions" because no intent could be inferred from the act or omission:

> When, by contrast, a pretrial detainee's claim of failure to provide medical care or protection from violence does not challenge a condition, practice, rule, or restriction, but rather attacks the episodic acts or omissions of a state jail official, the question is whether that official breached his constitutional duty to tend to the basic human needs of persons in his charge. With episodic acts or omissions, intentionality is no longer a given, and *Bell* offers an ill-fitting test.

Id. at 645. After extensive review of Supreme Court and Fifth Circuit precedent, the *Hare* Court adopted the "deliberate indifference" standard set forth in *Farmer v. Brennan* to measure the constitutionality of "episodic acts or omissions":

> Application of a deliberate indifference standard to claims by pretrial detainees is consistent with our cases and the dictates of *Bell*, because the deliberate indifference

> standard does not impose a higher burden on pretrial detainees that the *Bell* test. Properly understood, the *Bell* test is functionally equivalent to a deliberate indifference inquiry.

Id. at 646, 648-49.

In the instant case, neither the District Court nor the First Circuit applied the "deliberate indifference" standard as urged by the Petitioner. Since the allegations against the Petitioner can, at best, only be construed as episodic acts that do not reflect a general policy or condition of the Jail, the District Court and the First Circuit erred as a matter of law in applying the incorrect legal standard. In any event, the First Circuit's endorsement of the *Bell* standard differs from the approach taken by the Fifth Circuit in *Hare*, thereby creating a split between these Circuit Courts. For both of these reasons, the Supreme Court should grant the Petitioner's request for a writ of certiorari.

III.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS CREATED A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS BY ENDORSING THE LEGAL THEORY THAT A PRETRIAL DETAINEE'S FOURTEENTH AMENDMENT DUE PROCESS CLAIM COULD BE BASED ON THE ALLEGATION THAT A CORRECTIONS OFFICER TAUNTED THE DETAINEE AND THEREBY PROVOKED HIM TO TAKE ACTIONS PROHIBITED BY JAIL REGULATIONS.

The trial evidence was undisputed that the Respondent was only disciplined for violations of the Jail's rules and regulations. Put another way, the Respondent's conduct justified the

administrative lockdowns imposed on him. There is also no dispute that the rules and regulations that required the administrative lockdowns were promulgated to meet legitimate goals of safety and security within the Jail. The only issue raised with respect to "punishment" prohibited by the Fourteenth Amendment's Due Process Clause is the allegation that the Petitioner "taunted" the Respondent believing that these acts would provoke a sanctionable response.

Without exception, the Circuit Courts of Appeals and the Federal District Courts that have addressed this issue have held that verbal threats and "teasing" do not give rise to constitutional liability under Section 1983.[6] *See, e.g., McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (inmate claim that prison staff harassed him generally and harassed him in order to dissuade him from filing grievance about his seized property did not allege a constitutional violation); *Bender v. Brumley*, 1 F.3d 271, 274 n.4 (5th Cir. 1993) (pretrial detainee's allegations of verbal abuse was not actionable under Section 1983); *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir.), *cert. denied*, 464 U.S. 998 (1983) (threatening language and gestures by a corrections officer do not amount to constitutional violation); *Ellis v. Meade*, 887 F. Supp. 324, 329 (D. Me. 1995) (verbal threats, name calling, and threatening language coupled with gestures by a corrections officer not actionable under Section 1983. Officer's comments to pretrial detainee to the effect of "how ya' doing little boy" and "how's the little guy doing" did not state a constitutional violation); *Jackson v. Liberty County*, 860 F. Supp. 360, 363 (E.D. Tex. 1994) (hurt feelings, humiliation, and other heartfelt, yet objectively trivial, indignities do not violate the

---

6. The Petitioner has located only one case involving what might be called "teasing" that stated a Section 1983 claim against a prison official. *See Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986). However, the facts of the instant case are so dissimilar from those in *Burton* that the rule announced by the Eighth Circuit in *Burton* is inapposite.

Constitution); *Cautle v. Tone*, 851 F. Supp. 1236, 1241 (C.D. Ill. 1994) (verbal abuse not actionable under Section 1983); *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okl. 1977) (use of words, however violent, cannot constitute an actionable assault under Section 1983).

The evidence in the instant case reveals nothing more than taunting between an inmate and a corrections officer that resulted in admittedly legitimate administrative lockdowns. In ruling on the Petitioner's motion for judgment as a matter of law, the District Court erred in concluding that these activities could result in a constitutional violation. The First Circuit diverged from the great weight of authority by failing to correct this plain error made by the District Court. For these reasons, the Supreme Court should grant this petition for a writ of certiorari.

IV.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED AS A MATTER OF LAW BY FAILING TO REVERSE THE JUDGMENT AGAINST THE PETITIONER ON THE BASIS OF QUALIFIED IMMUNITY.

Qualified immunity protects governmental officials exercising discretionary powers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (citation omitted).

In analyzing a qualified immunity defense, an appellate court applies a two-pronged analysis. The First Circuit has described this analysis as follows:

> First, the court must determine, as a matter of law, whether the constitutional right in question was clearly established at the time of the alleged violation. If the right is clearly established, the court must then ask whether a reasonable similarly situated officer "should have understood that the challenged conduct violated" that right.

Soto v. Flores, 103 F.3d 1056, 1064 (1st Cir. 1997) (citing *St. Hilaire v. Laconia*, 71 F.3d 20, 24 (1st Cir. 1995)).

The Petitioner's conduct toward the Respondent did not violate a clearly established right of which a reasonable person would have known. While it is true that pretrial detainees have a right not to be "punished" under the Fourteenth Amendment, that same Amendment does not preclude appropriate disciplinary action. Moreover, the foregoing discussion demonstrates that there are significant differences of opinion between the First Circuit and other Circuit Courts concerning what standard applies to claims brought by pretrial detainees. For this reason, the Respondent's Fourteenth Amendment due process rights were not clearly established during the time period in question.

Finally, there was nothing objectively unreasonable about the Petitioner's conduct toward the Respondent. She had no reason to believe that her conduct toward him was likely to cause him to "lose control." She knew nothing about his "anxiety disorder" diagnosis. Even if she had, that diagnosis would not, according to Cichon, explain the Respondent's tendency to "lose control" or his violent behavior toward corrections staff. For all of these reasons, the Petitioner was entitled to judgment based on qualified immunity.[7]

---

7. The Petitioner's request for a jury instruction on qualified immunity and the Magistrate Judge's expressed finding with regard to (Cont'd)

CONCLUSION

For all of the foregoing reasons, Petitioner Deborah Huard respectfully requests that the Court grant her petition for a writ of certiorari and that the Court award such other and further relief as it deems just and appropriate.

Respectfully submitted,

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(Cont'd)
that issue reflect that the Petitioner did not waive the issue. Although the Petitioner did not use the term "qualified immunity" in her oral Rule 50 motions prior to jury instructions, she did argue that she did not violate any of the Respondent's clearly established constitutional rights. Moreover, the Magistrate Judge's ruling on the requested instruction indicates that he had considered the qualified immunity defense and had rejected it as a matter of law. This is not a circumstance where the trial court was not afforded an opportunity to rule on an issue prior to appeal. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-56 (1981) (consideration of issue by trial court despite technical failure to object preserves basis for appellate review).

In any event, this Court may review the decisions of the District Court and the First Circuit for "plain error." In light of the overwhelming case authorities, it was clear or plain error for the First Circuit not to find the absence of a clearly established constitutional right. Similarly, in light of the trial evidence, it was clear or plain error for either court to conclude that the Petitioner's conduct was not objectively reasonable.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 27, 1997

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1823

ERNEST P. O'CONNOR, JR.,

Plaintiff - Appellee,

v.

DEBORAH HUARD,

Defendant - Appellant.

No. 96-1824

ERNEST P. O'CONNOR, JR.,

Plaintiff - Appellant,

v.

DEBORAH HUARD,

Defendant - Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Eugene W. Beaulieu, *U.S. Magistrate Judge*]

Appendix A

Before

Torruella, *Chief Judge,*

Bownes, *Senior Circuit Judge,*

and Stahl, *Circuit Judge.*

William R. Fisher, with whom *Ivy L. Frignoca* and *Monaghan, Leahy, Hochadel & Libby* were on brief for Deborah Huard.

William C. Knowles, with whom *Jacqueline W. Rider* and *Verrill & Dana* were on brief for Ernest P. O'Connor, Jr.

June 27, 1997

TORRUELLA, *Chief Judge*. On March 15, 1994, Plaintiff-Appellee-Cross-Appellant Ernest P. O'Connor, Jr. ("O'Connor"), who was a pretrial detainee at the Kennebec County Jail ("the Jail") during all times relevant to the case, brought this Section 1983 suit for compensatory and punitive damages and declaratory relief against Alfred Cichon ("Cichon"), a physician's assistant at the Jail, and Catherine Mesaric ("Mesaric") and Appellant-Cross-Appellee Deborah Huard ("Huard"), Corrections Sergeants at the Jail. O'Connor contended that, while he was being held as a pretrial detainee, Cichon deprived him of medical attention, which amounted to cruel and unusual punishment, and that he was punished in violation of his due process rights under the Fourteenth Amendment. On January 20, 1996, summary judgment was granted in Cichon's favor. Prior to trial, Mesaric was dismissed from the suit.

Appendix A

The case against Huard was tried before a jury in June 1996. At the close of O'Connor's case, Huard moved for a directed verdict. The district court took the motion under advisement. At the close of all evidence, Huard renewed her motion, which the district court denied. The jury returned a verdict in O'Connor's favor, finding that Huard had violated his Fourteenth Amendment due process rights, and awarding him one dollar in compensatory damages. The court then instructed the jury on punitive damages, which the jury, after deliberating, declined to award. Huard filed a motion for judgment notwithstanding the verdict and a motion for a new trial, which the district court denied. Huard appeals the district court's jury instructions, the denial of her motion for judgment notwithstanding the verdict, and the award of attorney's fees to O'Connor. O'Connor cross-appeals the jury's refusal to grant him actual compensatory and punitive damages. We affirm.

BACKGROUND

On review of a jury verdict, we recite the facts in the light most favorable to that verdict. *See Ferragamo v. Chubb Life Ins. Co.*, 94 F.3d 26, 27 n.1 (1st Cir. 1996). Huard was a Corrections Sergeant at the Jail during all times relevant to this case. O'Connor was initially incarcerated in the Jail for a brief period in January 1993. On January 18, 1993, O'Connor told Huard that "he needed his medication." She instructed him to fill out a Medical Request form, and when he did so, she forwarded the form to the Medical Department. Pursuant to his request, O'Connor met with the Jail's physician's assistant, Cichon, for a medical evaluation. O'Connor asked Cichon for Xanax or Valium to treat anxiety. Cichon diagnosed O'Connor as suffering from "anxiety disorder," for which he prescribed Xanax. Soon thereafter, O'Connor was released from the Jail.

Appendix A

On October 30, 1993, O'Connor was placed in pretrial detention at the Jail, where he remained for approximately six months. O'Connor again submitted a request for medication, which Cichon now denied, because he could not verify O'Connor's medical history, believed that O'Connor did not suffer from an anxiety disorder, and was concerned about O'Connor's history of drug abuse.

During this detention, an animosity developed between Huard and O'Connor, eventually leading to daily verbal confrontations. O'Connor called Huard names that evidenced O'Connor's disdain for what he believed was Huard's sexual orientation. Huard, in turn, called O'Connor "a scumbag, a lowlife, a dirtbag, a drug addict, creep." Huard taunted O'Connor about his failure to get the medication he desired and his inability to cope without it. O'Connor would react to these taunts by kicking doors and banging the bars of his cell and by hurling verbal abuse at Huard. As a result of these actions, O'Connor would be removed from his cell and placed in administrative lockdown. Frequently, during these administrative lockdowns, the other inmates on the cell block would be restricted to their cells. By the time he was transferred from the Jail, O'Connor had spent 33 days in lockdown.

DISCUSSION

I. Jury instructions

Huard argues that the magistrate's instructions to the jury did not properly reflect the elements O'Connor was required to prove in order to succeed on his Fourteenth Amendment claim. In reviewing assertions of error in the jury charge, we determine whether the instructions adequately reflect the law applicable

to the controlling issues without tending to confuse or mislead the jury. *See United States v. Fulmer*, 108 F.3d 1486, 1494 (1st Cir. 1997).

The instructions to the jury were as follows:

> Plaintiff claims that his constitutional rights were violated when defendant deliberately provoked him into rage attacks and then disciplined him for his resulting outbursts. Specifically, his allegation is that he was punished without due process of law, in violation of his rights under the 5th and 14th Amendments to the United States Constitution.
>
> At the time of his incarceration at the Kennebec County Jail plaintiff was a pretrial detainee. In other words, he had not been convicted of a crime, but was being held pending trial. Under such circumstances, plaintiff could only be subjected to the restrictions and conditions of the detention facilities so long as those conditions and restrictions did not amount to punishment.
>
> Not all restrictions and conditions during pretrial detention amount to punishment in the constitutional sense, however. Once the government has exercised its authority to detain a person pending trial, it may obviously impose conditions or restrictions necessary to effectuate the legitimate goals

> of maintaining institutional security and ensuring the detained person's presence at trial.
>
> The question for you to decide is whether defendant imposed conditions or restrictions upon plaintiff that were reasonably related to those legitimate goals or whether they were arbitrary or without purpose.
>
> Absent a showing of an expressed intent on defendant's part to punish plaintiff, that question will generally turn on whether the conditions or restrictions could have been used for a legitimate purpose and whether they are excessive in relation to that legitimate purpose.
>
> If you find the conditions or restrictions were arbitrary or without purpose, you may infer that the purpose of the conditions or restrictions was punishment, and, therefore, unconstitutional.

Trial Transcript, vol. III, at 440-41.

These instructions accurately reflect the law as it relates to a pretrial detainee's claim of punishment in violation of the Due Process Clause. The government may detain one accused of a crime prior to trial in order to ensure his presence at trial. *See Bell v. Wolfish*, 441 U.S. 520, 536 (1979). Prior to an adjudication of guilt, however, a state government may not punish a pretrial detainee without contravening the Fourteenth Amendment's Due

Process Clause. *See id.* at 535. The government may, however, impose administrative restrictions and conditions upon a pretrial detainee that effectuate his detention, *see id.* at 537, and that maintain security and order in the detention facility, *see id.* at 536. When confronted with a charge by a pretrial detainee alleging punishment without due process, the "Court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538.

> Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 538-39. The government has a valid interest in managing the detention facility and, toward that end, may employ administrative measures that may be discomforting or are of a nature that the detainee would not experience if he were released while awaiting trial. *See id.* at 540. Barring "substantial evidence" that an administrative measure is an exaggerated response to these considerations, "courts should ordinarily defer to their expert judgment in such matters." *Id.* at 540 n.23.

Huard's claim of error addresses a conceptually different issue. Huard argues that the magistrate's instructions were

erroneous because they failed to incorporate the appropriate standard, which she contends is the Eighth Amendment "deliberate indifference" standard applied when a pretrial detainee alleges a denial of appropriate medical care. Huard's contention misconceives the claim at issue in this case. O'Connor's allegation as it related to Huard was that she intentionally provoked or incited him into "rage attacks" by relentlessly taunting him. O'Connor claimed that Huard engaged in such actions so that she could subsequently discipline him by imposing "administrative lock down." Given the nature of O'Connor's claim, the magistrate was correct in denying Huard's request to incorporate "deliberate indifference" instructions into the jury charge.

We emphasize that nothing in the resolution of this case or in this opinion is meant to suggest that a detention facility may not discipline a pretrial detainee who violates the facility's administrative regulations employed to maintain order and security. O'Connor's challenge was not that the Kennebec County Jail's system of allowing a pretrial detainee's discipline following a violation of its administrative regulations was suspect, but rather that Huard's intention was to punish O'Connor and her provocative or instigative actions were directed toward this end. Thus, the ability of a detention facility to reasonably discipline detainees who violate rules is not implicated by the issues presented in this case, in which a jury found that Huard's acts were tantamount to arbitrary and unreasonable punishment.

II. Qualified immunity

In her motions for directed verdict, both at the close of O'Connor's case and at the close of all the evidence, Huard

argued that she was entitled to judgment as a matter of law based on the merits of O'Connor's claim. In her motion for judgment notwithstanding the verdict, she again argued entitlement to judgment as a matter of law on the merits and also raised, for the first time, the defense of qualified immunity as a ground entitling her to judgment as a matter of law.

Federal Rule of Procedure 50(b) specifies that a party, having submitted a motion for a directed verdict may, after the verdict and entry of judgment, "move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdicts[.]" Fed. R. Civ. P. 50(b). A party may not raise a ground for judgment notwithstanding the verdict that was not previously presented to the trial court in a motion for directed verdict. *See Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035 (1st Cir. 1984) ("A party may not base its motion for a judgment n.o.v. on a ground that was not argued in its motion for a directed verdict."). "The last opportunity to raise [qualified immunity] is by motion for directed verdict." *Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991) (applying *Systemized of New England, Inc.* in the qualified immunity context).

Having failed to properly preserve her qualified immunity claim, Huard can prevail only upon a finding of plain error. *See Lewis*, 944 F.2d at 953. "The fact that [Huard] lost a very possible defense that would have eliminated liability for fees is not enough; plain error requires much more." *Id.* Huard never brought forward any evidence suggesting that her actions were objectively reasonable in light of O'Connor's clearly established due process right. Instead, she denied that she had acted as O'Connor alleged. Because there was no evidence in the record to support a finding of qualified immunity, the district court's

denial of her motion was not plain error. Accordingly, we affirm the district court's denial of Huard's motion for judgment notwithstanding the verdict.

III. Attorney's fees

On November 13, 1996, the district court entered an order granting O'Connor attorney's fees pursuant to 42 U.S.C. § 1988. The court essentially reasoned that, although O'Connor received only nominal damages of one dollar, the jury had granted the relief at the heart of O'Connor's claim by barring Huard's actions in violation of his due process rights.

Huard argues that we should reverse the order because O'Connor is not entitled to attorneys fees. She contends that under *Farrar v. Hobby,* 506 U.S. 103 (1992), although O'Connor is properly characterized as the prevailing party, the award of only nominal damages highlights O'Connor's failure to prove actual, compensable damages. Having failed to obtain compensatory relief, guard appears to contend that O'Connor's success in this case was technical or *de minimis.* We cannot agree.

Although the *Farrar* Court reversed the grant of attorneys fees to a civil rights plaintiff because the plaintiff's success was *de minimis* when compared to the outcome and relief sought, the Court's opinion did not impose a *per se* rule that a prevailing plaintiff who is awarded only nominal damages is not entitled to fees. To the contrary, the Court's opinion instructed district courts, in which discretion rests to grant attorney's fees to civil rights plaintiffs, *see* 42 U.S.C. § 1988 ("In any action or proceeding to enforce a provision of section[ ] . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a

reasonable attorneys fee as part of the costs."), that in exercising their discretion they should consider the reasonableness of an award of fees in light of the " 'relationship between the extent of success and the amount of the fee award.' " *Farrar*, 506 U.S. at 115-16 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983)); *see also Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir. 1994) (noting that "*Farrar* establishes that a district court should give primary consideration to the degree of success achieved when it decides whether to award attorneys fees," and affirming a grant of $66,535 in fees on award of one dollar in nominal damages), *cited with approval in Krewson v. Town of Quincy*, 74 F.3d 15, 17 (1st Cir. 1996).

Here, the district court recognized several important factors warranting the grant of attorney's fees. First, the district court's order recognized the importance of providing an incentive to attorneys to represent litigants, such as O'Connor, who seek to vindicate constitutional rights but whose claim may not result in substantial monetary compensation. Second — and worth noting in light of the *Farrar* Court's emphasis on the fact that Farrar sought only compensatory damages in the amount of $17 million and ultimately received one dollar from each defendant — the most basic remedy O'Connor sought in this case was relief from Huard's infliction of punishment without due process of law. Third, the court underscored the deterrent impact of this litigation, which will prevent "future abuses of the rights of pretrial detainees." Fourth, the court deducted from the requested amount for fees hours related solely to the two defendants who were not part of the trial, hours spent in excess of that reasonably required of a task, hours spent researching inapplicable areas of law, and hours inadequately explained or detailed. Based on the appropriateness of all of these considerations, we find that the district court's grant of attorney's fees was within its discretion.

IV. O'Connor's claim regarding damages

On cross-appeal, O'Connor appears to argue, for the first time, that the jury's failure to award him punitive and compensatory, rather than only nominal, damages was unreasonable. The short answer to O'Connor's contention is that the issue should have been raised before the district court in a motion for a judgment notwithstanding the verdict or a motion for new trial. We generally will not review a party's contention that the damages award is excessive or insufficient where the party has failed to allow the district court to rule on the matter. *See Carlton v. H.C. Price Co.*, 640 F.2d 573, 577 (5th Cir. 1981) (no appellate review of allegedly excessive or inadequate damages was available where trial court was not given the opportunity to exercise its discretion on the matter), *cited with approval in Wells Real Estate, Inc. v. Greater Lowell Ed. of Realtors*, 850 F.2d 803, 811 (1st Cir. 1988); *Braunstein v. Massachusetts Bank & Trust Co.*, 443 F.2d 1281, 1285 (1st Cir. 1971) (denying review of claim that award was excessive because appellant failed to raise the issue before the district court).

More importantly, however, we find that the jury was not unreasonable in failing to award O'Connor compensatory or punitive damages. O'Connor put forward evidence of damages related to his mental and emotional suffering endured as a result of Huard's actions, and did not present any evidence of economic damages. Assuming the jury was properly instructed on the issue of damages, and O'Connor does not challenge the instructions on appeal, the jury could reasonably have believed that O'Connor did not suffer a compensable harm. *See Davet v. Maccarone*, 973 F.2d 22, 27-28 (1st Cir. 1992).

Additionally, O'Connor appears to argue that Huard's

actions registered such malicious intent, reckless disregard, or callous indifference to O'Connor's constitutional rights that the jury was unreasonable in failing to award him punitive damages. Our review of the record indicates "that the evidence does not 'point so strongly and overwhelmingly in favor of the movant [plaintiff] that a reasonably jury could not have arrived at [its] conclusion.' " *Id.* at 30 (quoting *Chedd-Angier Prod. Co. v. Omni Publications Int'l, Ltd.*, 756 F.2d 930, 934 (1st Cir. 1985)). Accordingly, we will not disturb the jury's determination that punitive damages were not warranted in light of the facts of this case. *See id.*

CONCLUSION

For the foregoing reasons, we ***affirm***.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED JULY 15, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 94-0070-B

ERNEST P. O'CONNOR,

Plaintiff

v.

DEBRA HUARD,

Defendant

ORDER

Defendant has filed a Motion for Judgment as a Matter of Law or in the Alternative for a New Trial. The Motion is hereby DENIED.

Prior to trial, the Court indicated that this was a procedural due process case. Plaintiff, as a pretrial detainee at the Kennebec County Jail, alleged that Defendant taunted and harassed him to the (successful) end of prompting Plaintiff to commit violations of jail rules such that he could be disciplined. The jury was instructed that they must find Defendant's actions amounted to "punishment," which, because Plaintiff had not been convicted, violated his constitutional rights. Defendant's argument in this Motion that the evidence did not support a fading of liability under the more stringent cruel and unusual punishment standard is without merit.

Appendix B

Further, the evidence supported the jury's verdict. This was simply a case where Plaintiff's version of events did not comport with Defendant's. The jury was entitled to make its own credibility determination.

Finally, in light of the contradictory testimony, the Court will not reconsider its decision not to instruct the jury with respect to qualified immunity. As the Court indicated at the time, there was no factual gray area in this case. If the jury believed Plaintiff's version of events, the Court concluded as a matter of law that Defendant would not be entitled to qualified immunity. This determination did not turn on whether Defendant knew of Plaintiffs propensity to "lose control." The fact that Plaintiff committed disciplinary violations faster as a result of Defendant's conduct than would an inmate who did not suffer from an "impulse control disorder" does not negate the fact that Defendant was found to have engaged in the conduct. It is that conduct, taunting and harassing a pretrial detainee to the point where he might be disciplined, regardless of the detainee's ability to disregard the taunting and harassing, that constitutes the constitutional violation in this case.

Conclusion

For the foregoing reasons, the Motion for Judgment as a Matter of Law or for a New Trial is hereby DENIED in its entirety.

SO ORDERED.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on July 15, 1996.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED JULY 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1823

ERNEST O'CONNOR

Plaintiff, Appellee,

v.

DEBORAH HUWARD,

Defendant, Appellant.

BEFORE
Torruella, *Chief Judge,*
Bownes, *Senior Circuit Judge,*
Selya, Boudin, Stahl, & Lynch, *Circuit Judges.*

ORDER OF THE COURT
Entered: July 23, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

Appendix C

By The Court

WILLIAM H. NG, CLERK.

BY: JANICE M O'NEIL
Chief Deputy Clerk

Messrs. Fisher, Knowles, & Mrs. Frignoca